No. 96-1482

(13)

Supreme Court, U.S.
FILED
AUG 18 1997
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1996

LEXECON INC., *et al.*,
Petitioners,

v.

MILBERG WEISS BERSHAD HYNES & LERACH, *et al.*,
Respondents

On Writ of Certiorari to the United States Court of Appeals
for the Ninth Circuit

BRIEF OF *AMICI CURIAE* CREDIT SUISSE FIRST BOSTON CORPORATION, BEAR, STEARNS & CO., INC., DILLON, READ & CO. INC., DONALDSON, LUFKIN & JENRETTE SECURITIES CORPORATION, MORGAN STANLEY & CO. INCORPORATED, OPPENHEIMER & CO., INC. AND PRUDENTIAL SECURITIES, INC. IN SUPPORT OF RESPONDENTS

Joseph T. McLaughlin
Counsel of Record
General Counsel-Americas
Thomas F. Swift
CREDIT SUISSE FIRST BOSTON
CORPORATION
11 Madison Avenue
New York, NY 10010
Attorneys for *amicus*
Credit Suisse First Boston Corporation
(212) 325-2000

(Other counsel listed on signature page)

23 pp

TABLE OF CONTENTS

Page

INTERESTS OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 6

ARGUMENT 11

CONCLUSION 18

TABLE OF AUTHORITIEES

CASES

Page

In re *Collett*, 337 U.S. 55 (1949) 11

Girouard v. United States,
328 U.S. 61, 69 (1946) 12

Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947).....14

Piper Aircraft Co. v. Reyno, 454 U.S. 235 (1981)).....14

Robinson v. Town of Madison, 752 F. Supp. 842
(N.D. Ill. 1990).....15

Theriault v. Silber, 547 F.2d 1279 (5th Cir.),
rehearing denied, 551 F.2nd 863,
cert. denied, 434 U.S. 871,
rehearing denied, 434 U.S. 943 (1977).....15

STATUTES

28 U.S.C. § 1404.....*passim*

28 U.S.C. § 1407.....*passim*

OTHER AUTHORITIES

Administrative Office of the United States Courts,
Judicial Business of the United States Courts, Reports of the Director, 1987-1996 ..... 3, 13

Judicial Panel on Multidistrict Litigation, *Multidistrict Automated Tracking System* - Citation Summary,
All Dockets..... 4

1 J. Moore, A. Vestal & P. Kurland,
Moore's Manual: *Federal Practice and Procedure*,
§ 7.12[1] at 7-34 (1995) 11

Securities Data Co., *1996 U.S. Initial Public Offerings*..... 3

Securities Industry Association, 1997 Securities Industry
Fact Book 40 (1997)..... 3

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1996

No. 96-1482

LEXECON INC., *et al.*,
Petitioners,

v.

MILBERG WEISS BERSHAD HYNES & LERACH, *et al.*,
Respondents

On Writ of Certiorari to the United States Court of Appeals
for the Ninth Circuit

BRIEF OF *AMICI CURIAE* CREDIT SUISSE FIRST BOSTON CORPORATION, BEAR, STEARNS & CO., INC., DILLON, READ & CO. INC. DONALDSON, LUFKIN & JENRETTE SECURITIES CORPORATION, MORGAN STANLEY & CO. INCORPORATED, OPPENHEIMER & CO., INC. AND PRUDENTIAL SECURITIES, INC. IN SUPPORT OF RESPONDENTS

INTEREST OF *AMICI CURIAE*

Credit Suisse First Boston Corporation, Bear, Stearns & Co., Inc., Dillon, Read & Co. Inc., Donaldson, Lufkin &

Jenrette Securities Corporation, Morgan Stanley & Co. Incorporated, Oppenheimer & Co. Inc. and Prudential Securities, Inc. submit this brief *amici curiae* in support of respondents, by written consent of all parties, pursuant to Rule 37.3 of the Rules of this Court.[1]

Amici are leading corporate and investment banking firms, helping to raise and invest capital for companies and investors located in the United States and around the world, on domestic and international markets. They provide financial advisory, capital raising, sales and trading services and financial products both to users and suppliers of capital. They underwrite debt and equity offerings by some of the most preeminent names in American business, and engage in research, sales and trading of securities for their clients and for themselves in equity markets across the United States and abroad.

The securities markets, in which *amici* play a critical role, are themselves vital to U.S. commerce. American

[1] No counsel for a party authored this brief in whole or in part, and no other person or entity made any monetary contribution to the preparation or submission of this brief.

businesses engaged in 874 initial public offerings of securities last year, raising over $50 billion in the process to fund their operations. *See* Securities Data Co., *1996 U.S. Initial Public Offerings*. At the end of 1996, over 9,000 companies were listed on the three major securities markets in the United States, and their market capitalization was over $8.5 trillion. Securities Industry Association, Securities Industry Fact Book 40 (1997). The importance of the securities industry to United States commerce is also reflected in the amount of litigation it generates. For the last ten years, at least 1,700, and as many as 3,000, cases per year arising under the securities laws have been filed in the federal district courts. *See* Administrative Office of the United States Courts, *Judicial Business of the United States Courts, Report of the Director*, 1987-1996, Table C-2.

As major firms in the securities industry, *amici* have an interest in seeing that the rules governing cases that are transferred by the Judicial Panel on Multidistrict Litigation (the "JPML") for coordination or consolidation are developed and applied in a manner that allows for the just, efficient, speedy and

inexpensive determination of these actions. Securities firms are frequent participants in complex, multi-party and multi-court civil actions that are frequently the subject of referral to the JPML. In fact, over 21% of the cases entered on the JPML's docket since its inception in 1968 to the present (256 out of 1,197 groups of actions that have been considered for consolidation) are identified as securities cases. *See* Judicial Panel on Multidistrict Litigation, *Multidistrict Automated Tracking System* - Citation Summary, All Dockets. Efficient management and disposition of these cases, and reduction of the burdens that can be imposed on parties, witnesses and the judicial system from the proliferation of related cases in different courts, are of great concern to the securities industry as a whole.

The parties and the transferee court invest an extensive amount of time and resources during pretrial proceedings. Such proceedings can take years in complex cases, and include discovery disputes, motions to dismiss and summary judgment motions through which the transferee court becomes extremely familiar with the facts and law of the case. In many cases, only the

transferee court will be in a position to achieve an economical, efficient, just, speedy and least burdensome disposition of such cases at trial.[2] There is no reason to deny that court such power, when the requirements of section 1404 are met.

Affirming the decision of the court below, and permitting multiple cases involving common questions of fact and law to be determined in a single proceeding by a single court, when appropriate, will reduce the burgeoning demands on the federal courts' time, the burden on witnesses, the costs to the parties and the possibility of inconsistent verdicts in such litigation, and thus promote the efficient administration of justice. It also accords with the express language of the relevant statutes.

---

[2] The Federal Rules of Civil Procedure mandate consideration of the same interests when applying the Rules in any action, an indication of the primacy of these concerns in addressing procedural questions such as the location and management of pending litigation. *See* Fed. R. Civ. P. 1.

SUMMARY OF ARGUMENT

Sections 1404 and 1407 are complementary, not contradictory, procedural mechanisms that allow the courts to promote efficient administration of justice and resolution of claims. Together, they permit the district courts to minimize, to the extent possible, the burden on witnesses and the costs and risks to the parties that can result from litigating multiple, related cases in different and inconvenient forums.

Section 1404 permits transfer of a case to any district where it could have been brought initially, when such transfer serves the convenience of the parties and witnesses, and the interest of justice. 28 U.S.C. § 1404. Section 1407 permits the transfer to one court of one or more cases "for the convenience of parties and witnesses and . . . [to] promote the just and efficient conduct of such actions" any time two or more cases are pending in different courts with a common question of fact. 28 U.S.C. § 1407.

The two sections thus apply similar standards to different subsets of cases (although there is a substantial degree of overlap), and permit different types of transfer when those

standards are met in the cases which they cover. Section 1407 permits transfer to any court in the country of any case that shares a question of fact with another pending case, but is limited to pretrial matters. Section 1404 limits transfer to districts in which the original case could have been brought properly, but it does not require any related case to be pending there, and it permits a complete transfer of the case for all purposes. This Court should permit each type of transfer to continue to fulfill its mandated function in the federal court system.

Contrary to petitioners' argument, Rule 1407(a) does not speak to the power of the transferee district court to transfer a case for trial, much less prohibit such action. Rather, section 1407(a) addresses only the power of the Judicial Panel on Multidistrict Litigation, and grants that panel the power to transfer a case to any district court in the country, regardless of the appropriateness of venue in such court, for pretrial proceedings. Section 1407(b) governs the powers of the transferee district court, and places no restrictions on such court's power to address all pretrial proceedings.

Such pretrial proceedings include motions to transfer brought pursuant to 28 U.S.C. § 1404. There is nothing in section 1407 which limits the power of the Article III court to whom a case has been transferred to act on such a motion, and this Court should not read such a limitation into the transferee court's power. The provisions set forth in section 1404 governing the circumstances in which cases may be transferred to another court for trial, and the sound discretion of the district courts, provide all the procedural protections that litigants require and that Congress saw fit to grant.

If the provisions and limitations of section 1404 are met, a transferee court that has obtained jurisdiction over a case pursuant to a ruling from the JPML should have the same power that any other district court would have to transfer a case. A transferee court has all the power of the transferor court in every other respect, including the power to terminate the cases by granting a motion to dismiss or a motion for summary judgment, and to affect drastically the scope and nature of the litigation through its rulings on discovery and other pretrial issues. No statutory or

logical reason exists to deprive it of the power to transfer the cases, pursuant to section 1404, to a court that is more convenient to the parties and witnesses and better able to serve the interests of justice, whether that court is itself or some other court.

Complex, multi-party cases arising out of the same underlying set of facts, such as many securities law, mass tort and disaster cases, are particularly good candidates for consolidation under section 1407, and for transfer under section 1404, and there is no reason to believe that Congress intended the use of one to foreclose or limit the ability of a court to consider the use of the other. Many of the same factors that the JPML is obliged to consider in determining a 1407 motion are also considered in deciding a 1404 motion. The factors that led the JPML panel to transfer cases to a single court pursuant to Section 1407 may also favor transfer of the cases for trial pursuant to Section 1404. In fact, given the familiarity which the transferee court can be expected to obtain in the course of pretrial proceedings, the complexity of many of the cases which are the subject of proceedings pursuant to Section 1407, and the prerequisite that

cases consolidated under section 1407 all involve common questions of fact, one would expect many cases consolidated under section 1407 to prove suitable to transfer pursuant to section 1404. Such transfer can promote judicial efficiency, avoiding the necessity of multiple trials or duplicative motion practice by different judges on the same issues, with many of the same witnesses.

Taking 1404 power away from a transferee court needlessly hobbles that court, and can rob the 1407 procedure of at least a portion of its efficacy. The purposes which section 1404 was designed to further - - to better serve the convenience of parties and witnesses, and the interests of justice - - are likely to be met in cases that have been consolidated pursuant to section 1407, and transfer pursuant to section 1404 should at least be open to consideration in such cases at any appropriate time.

ARGUMENT

A. SECTION 1404 GOVERNS TRANSFERS OF ACTIONS TO A DISTRICT COURT FOR TRIAL, AND NOTHING IN SECTION 1407 PROHIBITS THE NORMAL APPLICATION OF THAT SECTION BY A TRANSFEREE JUDGE.

28 U.S.C. § 1404(a) provides:

> For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

The drafters of section 1404(a) "intended [it] to be generally applicable to all civil actions, whether governed by general or special venue provisions and whether the special venue provisions were contained in Title 28 or in other titles of the United States Code." 1 J. Moore, A. Vestal & P. Kurland, *Moore's Manual: Federal Practice and Procedure*, § 7.12[1] at 7-34 (1995). As this Court has ruled:

> The reach of "any civil action" is unmistakable. The phrase is used without qualification, without hint that some should be excluded.

In re Collett, 337 U.S. 55, 58 (1949).

Section 1407 does not act to overrule this principle, which has been in place for almost 50 years. Petitioners would have this Court read into section 1407 an implicit decision by Congress to prohibit application of section 1404 by the district court to which a case is transferred by the JPML. Nothing in the text or legislative history of Section 1407 suggests that Congress intended to preclude the normal application of Section 1404, however, and this Court should not lightly assume such an intent. *See Girouard v. United States*, 328 U.S. 61, 69 (1946) ("It is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law.").

In effect, such a prohibition would preclude transfer of any case until a case is ready to go to trial, and the decision would then have to be made by the original transferor court(s), possibly in hundreds, if not thousands, of separate motions. In the twelve months ended September 30, 1996, for example, over 6,000 cases were transferred by the JPML to the United States District Court for the Eastern District of Pennsylvania, and over 8,000 were transferred to the District Court

for the Northern District of Alabama. The Eastern District of Texas received 185 cases, the Southern District of Ohio 174 cases, and the Northern District of Illinois 123 cases. On a smaller, but still significant level in terms of effective case management and judicial efficiency, the Eastern District of Michigan received 80 cases in that year, the District of New Jersey 57 cases, the Southern District of California 54 cases, the Northern District of California 31 cases, the District of Maryland 28 cases, the Central District of Illinois 25 cases, the Southern District of New York 24 cases, the Eastern District of New York 19 cases, and the District of Minnesota 19 cases. *See* Administrative Office of the United States Courts, *Judicial Business of the United States Courts, 1996 Report of the Director*, Table S-21 at 74-76.

Although these numbers may include more than one consolidated case transferred into the particular district, they still reflect the consolidation of tens, hundreds or thousands of related cases before a single court. In many of those cases, the ordinary application of section 1404 would warrant a court's decision to transfer the cases for all purposes "for the convenience

of parties and witnesses and in the interests of justice," as the statute permits. Nothing in section 1407 precludes or should preclude the transferee court from weighing and applying such principles.

Petitioners misleadingly suggest that section 1404(a) "does not recognize judicial efficiency as a basis for transfer." Brief for the Petitioners at 20-21, n6. In fact, however, section 1404(a) explicitly permits courts to consider "the interests of justice" in determining whether to transfer a case, and for 50 years, even before the enactment of section 1404, this Court has recognized the district court's ability to weigh, along with the burden on parties and witnesses, "all other practical problems that make trial of a case easy, expeditious, and inexpensive." *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947); *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 241, 253-54 (1981) (recognizing court's own administrative and legal problems as factors in *forum non conveniens* determinations, and that courts may transfer cases more freely pursuant to section 1404's "relaxed" and "easy change of

venue" provisions than under the common law doctrine of *forum non conveniens*).

Numerous courts have held that judicial efficiency is a proper consideration to weigh in the balance of interests a court conducts pursuant to section 1404. *See, e.g., Theriault v. Silber*, 547 F.2d 1279, 1280 (5th Cir.) (transfer permissible because to do otherwise "would have caused extravagantly wasteful and useless duplication of time and effort of the federal courts"), *rehearing denied*, 551 F.2d 863, *cert. denied*, 434 U.S. 871, *rehearing denied*, 434 U.S. 943 (1977) (internal quotations omitted); *Robinson v. Town of Madison*, 752 F. Supp 842, 847 (N.D. Ill. 1990) (efficient administration of court system is "focus" of interest of justice consideration). And petitioners do not even address, much less rebut, the likelihood that transfer of such cases will serve the convenience of parties and witnesses, which they concede is a legitimate objective for the courts to weigh in a motion to transfer pursuant to section 1404.

Petitioners seek to raise a plaintiff's initial choice of the forum in which to bring an action to a binding determination, ignoring the long-standing and frequently applied provisions of section 1404 that permit the district courts to override the plaintiff's choice and transfer cases when appropriate. See Brief for the Petitioners at 19 ("At the end of those [pretrial] proceedings, plaintiffs are **guaranteed** that their cases will be returned to the forum they originally selected.") (emphasis added). At a minimum, petitioners seek to delay any consideration of such an issue until a case is returned to its original district by the JPML at the conclusion of all pretrial proceedings, and to force such determination to be made by the individual district court judges in which plaintiffs initially filed their case.

Such an outcome is not mandated by Section 1407. Rather, as Petitioners later concede, section 1407 is designed to preserve plaintiff's "'traditional privileges of selecting where, when, and how to enforce his substantive rights . . . while minimizing possible undue complexity from multi-party trials.'" Brief of Petitioner at 22, *quoting* Report of Coordinating Committee on

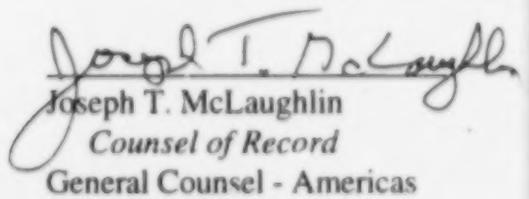
Multiple Litigation. It is not designed to expand upon those privileges by prohibiting transfers under section 1404. Transfer of cases pursuant to section 1404, where appropriate, is a normal check on plaintiffs' privilege to initially choose the forum, exercised by the district court with authority over the case to prevent such choices from needlessly burdening the parties, witnesses or the courts.

To prohibit transferee courts from exercising the power to transfer cases for trial pursuant to section 1404 would undercut the courts' ability to manage cases efficiently and effectively, encourage forum shopping by plaintiffs, increase the risk to litigants of inconsistent or contradictory verdicts and mandate possibly thousands of burdensome individual trials, or determinations of transfer motions just before trial, by courts that have had no contact with the cases for an extended period of time. Neither the language, the legislative history, nor common sense requires such a result. This Court should not impose such an inefficient allocation of scarce judicial and party resources when it is both not required by the unambiguous meaning of the statute, and

contrary to the goals of both applicable statutes and the efficient administration of justice.

CONCLUSION

For the foregoing reasons, the decision below should be affirmed.



Joseph T. McLaughlin
Counsel of Record
General Counsel - Americas
Thomas F. Swift
Credit Suisse First Boston
Corporation
11 Madison Avenue
New York, NY 10010
(212) 325-2000

Attorneys for *amicus*
Credit Suisse First Boston
Corporation

Mark E. Lehman
Bear, Stearns & Co., Inc.
245 Park Avenue
New New, NY 10022
(212) 272-2000

Attorneys for *amicus*
Bear Stearns & Co., Inc.

Michael A. Boyd
Donaldson, Lufkin &
Jenrette Securities
Corporation
277 Park Avenue
New York, NY 10172
(212) 892-3000

Attorneys for *amicus*
Donaldson, Lufkin &
Jenrette Securities
Corporation

Monroe Sonnenborn
Morgan Stanley &
Co. Incorporated
1251 Avenue of the
Americas
New York, NY
(212) 703-6000

Attorneys for *amicus*
Morgan Stanley &
& Co. Incorporated

Kenneth E. Meister
Prudential Securities, Inc.
199 Water Street
New York, NY 10292
(212) 214-6380

Attorneys for *amicus*
Prudential Securities, Inc.

Mark E. Kaplan
Oppenheimer & Co., Inc.
One World Financial
Center
200 Liberty Street
New York, NY
(212) 667-7000

Attorneys for *amicus*
Oppenheimer & Co., Inc.

Stuart L. Sindel
Dillon, Read & Co. Inc.
535 Madison Avenue
New York, NY 10022
(212) 906-7000

Attorneys for *amicus*
Dillon, Read & Co. Inc.